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In The

Supreme Court of the United States

October Term, 1972

No.

CONSOLIDATION COAL COMPANY, a corporation,

vs.

LAWRENCE W. BAILEY, individually and as the representative party of all other persons in the class similarly situated; THE TOWNSHIP OF PERRY, Greene County, Pennsylvania; FLOYD BIRCH, E. D. LEMLEY and L. CARL PHILLIPS, as Supervisors, constituting the Board of Supervisors of said Perry Township; ESTELLA JOHN as Occupational Privilege Tax Collector of said Perry Township; and DON WILKINSON as Earned Income Tax Collector for said Perry Township

LAWRENCE W. BAILEY, individually and as the representative party of all other persons in the class similarly situated,

Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner Lawrence W. Bailey, individually and as the representative party of all other persons in the class similarly situated, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on September 27, 1972.

OPINION BELOW

The opinion of the United States Court of Appeals for the Third Circuit, reprinted in Appendix A to this Petition, is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on September 27 1972, and is reprinted in Appendix B to this Petition. This Court's jurisdiction is invoked under 28 USC § 1254 (1).

QUESTION PRESENTED

In this case, initiated under the Federal Interpleader Statute, 28 U.S.C., Section 1335, the interpleaded nonresident miners, petitioners in this action, raise four constitutional issues; (1) whether the Commonwealth of Pennsylvania, through its political subdivisions, is without a jurisdictional base to extend its taxing powers into a West Virginia coal mine operated and regulated exclusively under the laws of West Virginia; (2) whether the tax ordinances of Perry Township, Pennsylvania infringe the Fourteenth Amendment to the United States Constitution in that they deprived the nonresident taxpayers of property without any corresponding benefits; (3) whether the taxing ordinances of Perry Township place an undue burden on interstate commerce by taxing nonresident miners' gross income and by charging the nonresident miners for the privilege of working in an interstate coal mine, thus duplicating taxes levied by the State of West Virginia; and (4) whether the Local Tax Enabling Act of 1965, December 31, P.L. 1257, Section 511, as amended which allows a mandatory tax credit for taxes paid to another state or political subdivision by residents of the Commonwealth but contingent the

credit to nonresidents upon the happening of two events, denies to some nonresidents the same uniformity, equal protection and privileges and immunities as other nonresidents and all residents of the taxing state.

The Court of Appeals below answered all the questions presented in the negative. Of primary importance is the conclusion of the Court of Appeals as to the fourth question. The thrust of the lower court's decision is that since local governmental units could not enact income tax in West Virginia no real issue regarding the privileges and immunities clause was presented.

The Court's disposition of these issues will substantially effect the future of countless interstate coal mines and their employees throughout Appalachia who have been or are being placed in similar circumstances as the nonresident petitioners.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The pertinent provisions of Article 1, Section 8 of the United States Constitution, commonly referred to as the "Commerce Clause," are as follows:

> "The Congress shall have the Power to Regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes."

2. The pertinent provisions of Article IV, Section 2 of the United States Constitution are as follows:

> "No Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in several States."

3. The pertinent provisions of the Fourteenth Amendment to the United States Constitution are as follows:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

4. The pertinent provisions of Article 8, Section 1 to the Constitution of the Commonwealth of Pennsylvania are as follows:

"All taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws."

5. The pertinent provisions of Title 53, Section 6914 (Purdon's Penna. Statutes Annotated, West 1971 Suppl.):

Payment of tax to other political subdivisions or states as credit or deduction: withholding tax.

Payment of any tax to any political subdivision pursuant to an ordinance or resolution passed or adopted prior to the effective date of this act shall be credited to and allowed as a deduction from the liability of taxpayers for any like tax respectively on salaries, wages, commissions, other compensation or on net profits of businesses, professions or other activities and for any income tax imposed by any other political subdivision of this Commonwealth under the authority of this act.

Payment of any tax on salaries, wages, commissions, other compensation or on net profits of business, professions or other activities to a political subdivision by residents thereof pursuant to an ordinance or resolution passed or adopted under the authority of this act shall be credited to and allowed as a deduction from the

liability of such persons for any other like tax respectively on salaries, wages, commissions, other compensation or on net profits of businesses, professions or other activities imposed by any other political subdivision of this Commonwealth under the authority of this act.

Payment of any tax on income to any political subdivision by residents thereof purusant to an ordinance or resolution passed or adopted under the authority of this act shall, to the extent that such income include salaries, wages, commissions, other compensation or net profits of businesses, professions or other activities, but in such proportion as hereinafter set forth, be credited to and allowed as a deduction from the liability of such persons for any other tax on salaries, wages, commissions, other compensation or on net profits of businesses, professions, or other activities imposed by any other political subdivision of this Commonwealth under the authority of this act.

Payment of any tax on income to any state or to any political subdivision thereof by residents thereof, pursuant to any State of local law, may at the discretion of the Pennsylvania political subdivision imposing such tax, to the extent that such income includes salaries, wages, commissions, or other compensation or net profits of businesses, professions, or other activities but in such proportions as hereinafter set forth, be credited to and allowed as a deduction from the liability of such person for any other tax of salaries, wages, commissions, other compensation or net profits of businesses, professions or other activities imposed by any political subdivision of this Commonwealth under the authority of this act, if residents of the political subdivision in Pennsylvania receive credits and deductions of a similar kind to a like degree from the tax on income imposed by the other state or political subdivision thereof.

Payment of any tax on income to any State other than Pennsylvania or any political subdivision located outside the boundaries of this Commonwealth, by residents of a political subdivision located in Pennsylvania shall to the extent that such income includes salaries, wages, commissions, or other compensation or net profits of businesses, professions or other activities but in such proportions as hereinafter set forth, be credited to and allowed as a deduction from the liability of such person for any other tax on salaries, wages, commissions, other compensation or net profits of businesses, professions or other activities imposed by any political subdivision of this Commonwealth under the authority of this act.

Where a credit or a deduction is allowable in any of the several cases hereinabove provided, it shall be allowed in proportion to the concurrent periods for which taxes are imposed by the other state or respective political subdivisions, but not in excess of the amount previously paid for a concurrent period.

1965, Dec. 31, P. L. 1257, Section 14, as amended 1967, July 7, P. L. 171, Section 1.

6. The pertinent provisions of the West Virginia Code, Chapter 11 Article 21, Section 20 (Michie 1966) provides:

(a) General—A resident shall be allowed a credit against the tax otherwise due under this article for any income tax imposed for the taxable year by another state of the United States or by the District of Columbia, upon income derived both therefrom and subject to tax under the article.

STATEMENT OF THE CASE

This case originated as an interpleader action in the Court below. The plaintiff, Consolidation Coal Company, initiated the suit being the holder of a fund that is claimed by two contending parties. The major vexing aspect of this suit arises from the fact that the fund which Consolidation holds is composed of tax monies which it has withheld from the pay of their employees. The one claimant to the fund is the tax collectors. The other is a class of employees of Consolidation who asserts that the tax cannot be imposed upon the class constitutionally.

The tax collectors represent Perry Township in Greene County, Pennsylvania. The class of taxpayers resisting the tax are all residents of West Virginia who work in a coal mine and must enter the coal mine through a portal in Pennsylvania.

Bits and pieces of litigation preceded the present proceeding commenced in the Federal District Court for the Western District of Pennsylvania. The first action was started on behalf of the class of West Virginia miners as an equity action for an injunction in the Circuit Court for Monongalia County, West Virginia. That Court issued an injunction against Consolidation Coal ordering it not to pay over the monies withheld from the nonresident miners.

Consolidation then sought an interpleader action in the Federal District Court for relief in the Northern District of West Virginia. That action was dismissed with the Court not going to the merits of the controversy. Then Perry Township brought suit in a Pennsylvania Court in what was purported to be a class action against the West Virginia miners and Consolidation

Coal Company. In what the class maintained was at best an abortive attempt to bind it by a judgment, a Pennsylvania State Court, the Common Pleas Court of Greene County, entered judgment against the class and the Consolidation Coal Company ordering the money to be paid over to the Township. Caught in the crossfire between a West Virginia State Court injunction and a Pennsylvania State Court judgment for money, Consolidation Coal again turned to the federal court for interpleader action.

At this juncture, it should be noted that the class here involved has not been a highly structured or well organized group. It organized enough to make the first move in the Circuit Court of Monongalia County, West Virginia. The class then went unrepresented until the present action in interpleader before the lower court.

In the interpleader action, Consolidation Coal Company, successfully asserting its right to interpleader relief named the class and Township as defendants. The miners agreed that it was a class that could be treated as such under Rule 23 of the Federal Rules of Civil Procedure and asserted a positive claim to the fund as did Perry Township and the tax collectors. The lower court after receiving guidance from this court granted the interpleader and decided the case on the merits between the two competing claimants. That decision was totally favorable to Perry Township and the Tax Collectors thereby making this appeal of the miners possible.

Consolidation Coal Company is a Delaware Corporation with offices in Pittsburgh, Pennsylvania and Morgantown, West Virginia. Consolidation is engaged in the mining of coal in Monongalia County, West Virginia and in that connection owns and operates the

Humphrey Mine wherein the appellant-miners (hereinafter referred to as the nonresident miners) are employed. The Humphrey Mine is somewhat unique in that part of the mine extends geographically into the subsurface of the Commonwealth of Pennsylvania. Originally all portals and ventilation shafts were located in West Virginia but in order to save time a new portal to the Humphrey Mine was constructed in Mt. Morris, Pennsylvania. Presently, the coal is extracted from under Mt. Morris, Pennsylvania but carried into and produced in West Virginia. The location of this new portal allowed Consolidation to save wasted manpower hours since the location of the new portal was closer to the actual situs of work. A significant portion of the nonresident miners (335),[1] who principally are involved with the extraction of coal, enter the Humphrey Mine through the Mt. Morris portal. No coal is produced from this portal. Its exclusive use is for the entrance of the miners and for ventilation purposes. All coal produced in the mine is brought to the surface, loaded and processed in West Virginia. With respect to travel time, the time lapse between the West Virginia border and the Mt. Morris portal is approximately three minutes. Pursuant to the National Bituminous Coal Wage Agreement of 1968, a bathhouse is provided for the miners to change clothes before they enter the mine. No charge is assessed for the use of the bathhouse and

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1. Originally, it was maintained by the nonresident miners that the Township's tax ordinances applied only to those miners who portal or work in the portal house at Mt. Morris. However, before the lower court, the legal representatives of the Township claimed that it was to apply to all those working in the Humphrey Mine since all employees at some time during the day travel subsurface under Mt. Morris. There is a number of miners who enter the Humphrey Mine at the portal in Monongalia County, West Virginia who were not affected by the Township's taxes until the day of trial in the lower court.

approximately five minutes are spent there before the miners enter the portal elevator to begin work.[2]

Pursuant to the Local Tax Enabling Act of 1965, Dec. 31, P. L. 1257, Section 511 as amended, Perry Township (i.e. "Township") enacted two taxes: (1) an Occupational Privilege Tax of $10.00 per man for both residents and nonresidents of Pennsylvania and (2) a 1% Earned Income Tax on gross wages, salaries, commissions and other compensation payable by nonresidents only. Upon proper notice,[3] Consolidation was directed by the Township to withhold the above mentioned taxes from all the miners' wages. The Earned

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2. The pay period for the nonresident miners does not begin until there is an entrance on the portal elevator. The National Bituminous Coal Wage Agreement of 1968 provides as follows:

Wages and Hours.

(a) For all inside employees a work day of eight hours from portal to portal which means collar to collar or bank to bank, is established including a staggered thirty minutes for lunch, and without any intermission or suspension of operation throughout the day, (page 18).

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3. These two letters were sent to Consolidation Coal on March 17, 1969.

Christopher Coal Company Division
Consolidation Coal Company
P. O. Box 100
Osage, West Virginia 26543
Dear Sirs:

You are hereby notified that the Occupational Privilege Tax Ordinance enacted and ordained by the Township of Perry, Greene County, Pennsylvania, levies a tax in the amount of $10.00 on the privilege of engaging in an occupation within the Township of Perry.

You are, therefore, requested and authorized to deduct this tax from the pay of each of your employees who work at your Humphrey Portal located at Mt. Morris, Perry Township, Pennsylvania and from each employee who enters your Humphrey Mine at the above portal. This tax is due and payable on April 30, 1969.

Very Truly Yours.
Estella John
Tax Collector
Perry Township, Greene County,
Pennsylvania

Income Tax is levied against all income of the miners during the year, including vacation pay. None of the money collected from the resident Pennsylvania miners has been held by Consolidation Coal. To date, none of the tax fund accumulated from the wages of the resident West Virginia miners has been paid to the Township. The tax fund totals approximately $88,000 and it is the final possession of this fund that has caused the present lawsuit.

Petitioners Lawrence W. Bailey (i.e. "Bailey"), a resident and taxpayer of West Virginia is joined individually and as the representative party of all other members of the class of miners similarly situated (i.e. 335 West Virginia miners who use the Mt. Morris portal and are subject to the Occupational and the Earned Income Taxes). All of the miners represented by "Bailey" are residents and taxpayers of West Virginia

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Christopher Coal Company
P. O. Box 100
Osage, West Virginia
Gentlemen:

As of January 15, 1969, all persons in your employ who work or portal at the Mt. Morris portal in Perry Township Greene County, Pennsylvania became subject to a one percent (1%) earned income tax. There will be no exceptions to this liability unless specifically specified in writing by this office.

All employees, regardless of the state or municipality of residence, are liable for this tax. If you have not as yet started to withhold this tax from your employees wages it will be incumbent upon you to withhold the tax retroactively on all income earned or paid on or after January 15, 1969. This does not in any way effect the income tax liability of residents of Central Greene County School District from whom you were previously withholding.

The employee's name, city, borough, Township, and/or state of residence should be included on each report so that tax monies withheld can be transmitted to the proper district. Should you have any further questions regarding this change please contact the writer.

Very Truly Yours,
Don Wilkinson
Income Tax Administrator
Township of Perry

and are claimants to the tax fund. All the miners are members of District 31, United Mine Workers, located at Fairmont, West Virginia and the jurisdiction of the United Mine Workers extends to West Virginia only. The miners receive no benefits from the Commonwealth of Pennsylvania or its political subdivision such as workmen's compensation, unemployment, black lung compensation, and other benefits and privileges given to miners who work under the jurisdiction of the State of Pennsylvania Department of Mineral Resources.

Respondents Perry Township is a Pennsylvania Township. Floyd Birch, E. D. Lemley and L. Carl Phillips are Supervisors of Perry Township; Estella John is the Occupational Privilege Tax Collector for "Township"; Don Wilkinson is the Earned Income Tax Collector for the "Township." All of the aforesaid persons are Pennsylvania residents and claimants to the tax fund.

Except for federal regulations the Humphrey Mine is run exclusively under the laws of West Virginia and the regulations of the West Virginia Department of Mines. Until the present suit, West Virginia exercised exclusive taxing jurisdiction over all the property in the Humphrey Mine. In fact the State of West Virginia levies a personal property tax on all personal property used in the mine. Similarly the State of West Virginia levies a business and occupation tax on Consolidation Coal based on the amount of coal produced from the Humphrey Mine.

There exists an informal understanding between West Virginia and Pennsylvania which is enforced by both States, that provides that the law of the state in which the original entrance of the mine is opened governs the conduct of the mine.

REASONS FOR THE WRIT

The Circuit Court of Appeals reduced the issues posed simply to whether the Commonwealth of Pennsylvania could levy an income tax on the nonresident miners. However, an ignored issue concerns which jurisdiction—West Virginia or Pennsylvania—has the constitutional power to tax mining operations that are conducted geographically under the surface of the Commonwealth of Pennsylvania. Significantly, the issue before this Court is whether the Commonwealth has rendered itself constitutionally impotent to reach through taxation the nonresident miners. What is being suggested is whether the abandonment of control of the mining operations by Pennsylvania has brought its power to tax within the prohibitions enunciated by this Court in **Connecticut General Life Insurance Co. v. Johnson, Treasurer of California,** 303 U. S. 77 (1938) and **Wisconsin v. J. C. Penney Co.,** 311 U. S. 435 1 30 A. L. R. 1229 (1940). The decision of the Court below conflicts with the aforesaid decisions of this Court.

As an important subsidiary issue, the constitutionality of the pertinent tax credit provision pertaining to nonresidents is challenged. Petitioners contend that this provision results in a heavier tax burden for the nonresident miners while at the same time they are afforded less benefits and protection. Such a result is a denial of equal protection and offends the privilege and imunities clause. The decision below which did not accurately speak to the issue raised will have a deleterious effect on the protection of the substantive constitutional rights of nonresident miners.

I. The Decision Below Conflicts With Decisions of This Court

Certiorari should be granted because the holding of the Court below conflicts with a long line of substantial precedent cases from this Court.

The thrust of the lower court's decision was that the nonresident miners' actual presence in Pennsylvania gave rise to taxing obligations. The lower court, thereby, attempted to adopt the proposition that due process will not be violated if the nonresidents, by engaging in income producing activities in Pennsylvania, have enjoyed the benefits and protections of the laws of the State. In such a case, as it will be later discussed, the nonresidents are justifiably burdened with obligations imposed by the taxing jurisdiction, one of which includes the duty to pay taxes. However, Bailey and the class he represents pose the perfect example where it can hardly be said that the laws of Pennsylvania afforded them any benefit or privilege sufficiently substantial to justify a correlative obligation to pay taxes. It is doubtful whether the relative remote benefit the nonresident miners derived from the use of the territory is the sort of "activity" or "contacts" envisioned by the United States Supreme Court in **Hanson v. Denskla,** 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed. 2d 1283 (1958). In **Hanson,** the court held that because the defendant exercised no "real" privilege in the state, there was no corresponding duty giving rise to personam jurisdiction. The activities of the nonresident miners which create an obligation to pay taxes certainly cannot be based on their employment contract which arose and is enforced in West Virginia. Their contract clearly has no "substantial contact" with Pennsylvania and thus would fail under the test in **McGee v. International**

Life Ins. Co., 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed. 2d 223 (1957) that held only if a defendant has "substantial contact" with the state would there be a sufficient invocation of the benefits and protections of the state creating corresponding obligations. The only other "activity" that is connected with the income producing activities that the court could possibly be using to satisfy the **Hanson** test is mere presence of the nonresident miners in Pennsylvania. This contention that "presence" automatically equals "activity" has often been expressly rejected as being contrary to the doctrine of **Hanson** and **International Shoe.** See, e.g., **Da Silveria v. Westphalia Separator Co.**, 248 Cal. App. 2d 789, 57 Cal. Rptr. 62 (1967); **O'Brien v. Comstock Foods, Inc.**, 123 Vt. 461, 194 A. 2d 568 (1963).

An important factor bearing directly on the issue of jurisdiction is the existence of an informal agreement between the Commonwealth of Pennsylvania and the State of West Virginia.[4] This agreement allows the State of West Virginia to exercise jurisdiction over the income producing activities of the miners. It is somewhat of an anomaly to say that "territorially" the mine is located in Pennsylvania since the features usually controlling in determining governmental territory are absent. At the very least, this agreement

4. There is an informal agreement bearing upon jurisdiction of mines that cross state boundaries between the State of West Virginia and the Commonwealth of Pennsylvania. This agreement is recognized and acted upon by the authorities of these states who are charged with the enforcement of State mining laws. This agreement provides that the State where the original opening of a mine occurs asserts jurisdiction over the entire mine, even though mining operations may proceed under the other state so long as the company that is conducting such mining operations is present and doing business in the State of the original opening. Under this agreement, and consequently since the mine originally opened in West Virginia, it is under the jurisdiction of West Virginia mining laws, even though mining operations occur under the Commonwealth of Pennsylvania. **Additional Findings of Fact, No. 5.**

should be construed as limiting the Commonwealth's jurisdiction to tax the miners since the very thing it has ceded to West Virginia forms the source of the income producing activity.

The nonresident miners allege that the Township of Perry had neither jurisdiction of activities giving rise to their income nor justification to levy a tax. In this regard consider these pertinent facts:

(a) the taxpayers are resident of West Virginia;
(b) they pay income tax to the State of West Virginia;
(c) they work in a West Virginia mine;
(d) they earn no income except that made in a West Virginia mine;
(e) they receive the following benefits from the State of West Virginia only: (1) workmen's compensation, (2) unemployment compensation, and (3) black lung compensation;
(f) the mine is run exclusively under the laws of the State of West Virginia and the rules and regulations promulgated by the West Virginia Department of Mines;
(g) all health, safety laws, except federal, are made and enforced by the State of West Virginia;
(h) necessarily, judicial cases arising from this mine have been filed in the State Courts of West Virginia;
(i) the employment contracts are made and enforced under the laws of West Virginia.

In deciding whether there is jurisdiction and justification to levy a tax, the United States Supreme Court has articulated two separate but somewhat related tests[5] (1) **Control** over the subject matter taxed, and

5. A third test, the "integration" theory, has received no judicial endorsement. See Arthur Leon Harding, **Double Taxation of Property and Income** (Cambrigde, Harvard University Press, 1933). Mr. Harding believes that the right to tax rests upon the integration of the subject

(2) **Protection afforded**—whether the state has given some benefits that it can ask for something in return.

The Supreme Court in the case of **Connecticut General Life Insurance Co. v. Johnson, Treasurer of California,** 303 U.S. 77 (1938) held that:

> The limits of the state's legislative jurisdiction to tax, prescribed by the Fourteenth Amendment, are to be ascertained by reference to the incidence of the tax upon the objects rather than the ultimate thrust of the economic benefits and burdens of transactions within the state. As a matter of convenience and certainty, and to secure a practically just operation of the constitional prohibition we look to the state's power to control objects of the tax as marking the boundaries of the power to lay it. **Hence it is that a state which controls the property and activities within its boundaries admitted to do business there may tax them.**

The performance of the activities giving rise to the miners' income is not contingent or dependent upon any privilege of authority granted by Perry Township or the Commonwealth of Pennsylvania. Neither the Commonwealth nor Perry Township has attempted to exercise its control over the mine to any extent. Both refuse to send its mining inspectors, its police inspectors or its fire inspectors into the Humphrey Mine to insure

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into the economy of the state in question. The state does not acquire tax jurisdiction merely by providing some protection to property or persons or because it can exercise control over them. For example, goods traveling through a state are protected by that state and, to a certain extent, are under the control of that state and could be taxed according to either the benefit theory or the control theory. Such goods are not, however, integrated into the economic organism of the state in Harding's use of the term and are not subject to taxation according to the integration theory. The determination of which state has jurisdiction to tax income is made by identifying the nature of the individual's contribution to the economic mechanism and then determining which place the economic activity and the contribution is integrated.

that minimum standards of safety are maintained. Rather, it is submitted that the only control or attribute of sovereignty exercised over the income producing activities by the Commonwealth is that which is exercised over the income of the miners after it has been earned totally at the expense of the miners and the State of West Virginia.

The second and more popular theory that is used to decide the constitutionality of a tax is the "economic benefit" theory. It was announced by Justice Frankfurter in **Wisconsin v. J. C. Penney Co.**, 311 U.S. 435, 130 A.L.R. 1229 (1940):

> "Taxable event," "jurisdiction to tax," "business situs," "extraterritoriality," are all compendious ways of implying the importance of state power because state power has nothing on which to operate. These jags are not instruments of adjudication but statements of results in applying the sole constitutional test for a case like the present one. **That test is whether property was taken without due process of law, or, it paraphrased, whether the taxing power exerted by the state bears fiscal relations to protection, opportunities and benefits given by the state.** The simple but controlling question is whether the state has given anything for which it can ask a return.

Similarly, in **Ott v. Mississippi Barge Line**, 336 U.S. 169, 69 S.Ct. 432, 93 L.Ed. 585 (1949) the Court stated "so far as due process is concerned the only question is whether the tax in practical operation has relations to opportunities, benefits, or protection conferred or afforded by the taxing states." Accord. **National Bellas Hess v. Department of Revenue** 386 U.S. 753, 87 S.Ct. 1389, 18 L.Ed. 2d 505 (1967).

Uncontroverted facts affirmatively show that while the miners are engaged in their occupation they receive no benefits from the Commonwealth of Pennsylvania. The taxing authorities argue, however, that the situs of the portal and the bathhouse in Mt. Morris, Pennsylvania, the fact that the work is done under the surface of Mt. Morris and the fact that the miners exercise the privilege of using the highways to travel in and out of Pennsylvania are corresponding benefits capable of satisfying the due process requirement. However, we contend that these benefits are not directly related to employment with the exception of the mine being located in Mt. Morris, Pennsylvania. "Mere presence in transit or sojourn" does not satisfy the constitutional prerequisite for taxation purposes. **Miller Bros. Co. v. Maryland,** 347 U.S. 340, 74 S.Ct. 535, 98 L.Ed. 744 (1954). The appropriate tax for use of a highway is a toll tax. This burden is then shared equally among its users.[6] Clearly, the location of the mine is under the surface of Perry Township, but this fact is unimportant. Pennsylvania has ceded jurisdiction to West Virginia to control, protect and regulate that territory. The **Quid Pro Quo** is that Pennsylvania when similarly situated is offered the same rights.

The most significant argument of the taxing authorities centers around the location of the portal to the Humphrey Mine in Mt. Morris, Pennsylvania. This portal is the entrance to the Humphrey Mine and the facts reflect that the income period of each miner begins when he enters the portal elevator descending toward the situs of work. The amount of time spent

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6. Accord: **Hanover Fire Insurance Co. v. Harding,** 272 U. S. 494, 47 S. Ct. 179, 71 L. Ed. 372 (1926), which held that a statute resulting in inequality of burdens upon the rights of like character, denies equal protection.

daily on the portal elevator does not exceed ten minutes. The taxing authorities contend that this contact with the Commonwealth is a sufficient nexus for taxation purposes. The miners would concede that since "theoretically" some Pennsylvania police protection could be afforded the miners while they wait to enter the mine, the amount of income earned during that brief period is taxable. However, there is a total climax to such police protection once the elevator has begun its downward movement. The miners contend the fact that the coal is extracted from the subsurface of Perry Township is not significant since the taxing authorities argue that the tax is upon every miner who works in the Humphrey Mine, rather than having as a prerequisite the fact that they enter the Mt. Morris portal. Clearly, the Township has no right to tax the entire activities of an interstate mine.

The fact that cars of the miners are parked in a lot owned by their employer can be of no potential moment to the taxing authorities. Assuming that the miners' position regarding income earned in the mine is tenable then the mere fact that cars are parked in the taxing jurisdiction while income accrues in another does not give the former authority to tax income. It would be another proposition if the tax was labeled a parking tax.[7]

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7. Since the taxes are not designated as toll or parking taxes they cannot be collected under the guise of a "toll" or "parking" tax justification.

"It serves no purpose for the State Tax Commissioner to suggest that if, there were some intrastate commerce involved or if an appropriate tax were imposed as compensation for petitioner's use of the highways, the same sum of money as is at issue here might be collected lawfully from petitioner. Even though the financial burden on interstate commerce might be the same, the question whether a state may validly make interstate commerce pay its own way depends first of all upon the constitutional channel through which it attempts to do so." **Spector Motor Service v. O'Conner, supra,** at page 608.

Additionally, it is important to understand that there are "surface" benefits given to the miners. But there are no "subsurface" benefits. Crucially, all income is earned while under the surface of Mt. Morris. Probably to some degree the Commonwealth exercises some control over the surface operations of the Humphrey Mine. The Commonwealth, however, exercises no control to any extent over the subsurface activities of the Humphrey Mine.

The case is unusual since it is generally considered that to the extent a taxpayer exercises the privilege of working within a state, he enjoys the benefits and protections of the laws of that state during the course of his employment. Further, the exercise of the privilege of working within a state will presumptively give rise to obligations, and, so far as those obligations arise out of or are connected with the income producing activities within the state, an ordinance requiring a taxpayer to pay for that privilege, as other similarly situated taxpayers, is not a denial of due process. **International Shoe Co. v. Washington,** 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945).[8] The facts of this case have sufficiently rebutted any presumption of obligations caused and benefits enjoyed. Rather, there is an insufficient connection between the income producing activities and benefits and protections afforded. The rule requiring "minimum" contacts with the state is as much qualitative as it is quantitative. See Brendt Lohr-Schmidt, **Developing Jurisdictional Standards for State Taxation of Multistate Corporate Net Income**; 22 Hasting

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8. The broad power of a state to tax nonresidents is based on the Supreme Court's determination that the Fourteenth Amendment does not prohibit such a tax so long as the income giving rise to the tax has a sufficient relation to the benefits and protections provided by the taxing state.

L. J. 1035 (1971). The Supreme Court in **Hanson v. Denckla,** 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed. 2d 1283 (1958), attempted to formulate a more definite test for determining exactly what conduct constitutes "minimum contacts:"

> The application of that rule (minimum contact) will vary with the quality and nature of the defendants' activity, but it is essential in every case that there be some act by which the defendant purposefully avails itself of the privilege of conducting **activities** within the forum state, **thus invoking the benefits and protections of its laws.** (Emphasis added.)

II. The Decision Below Will Have a Deleterious Effect on the Protection of the Substantive Constitutional Rights of Nonresident Miners in Appalachia

The lower court resolved the constitutional challenge to the Pennsylvania tax credit provision by providing as follows:

> Appellants also contend that the Pennsylvania Enabling Act deduction provision, 53 Pa. Stat. Ann. §6914 (Supp. 1972), is violative of the equal protection and privileges and immunities clauses of the United States Constitution because it provides that a Pennsylvania resident receives a credit for out-of-state income taxes he pays, whereas a nonresident is given such credit only if the state where he paid the tax has a reciprocal provision giving Pennsylvania residents a similar credit. This, appellants argue, subjects nonresidents to the risk of multiple taxation from which residents are protected. The risk to which they refer, however, is entirely hypothetical. Political subdivisions of West Virginia do not have the power to enact either a personal income tax or an earned income tax. W. Va. Code Ann., §§11-8-1 et seq., 11-21-1 et seq.

> (1966); and the state gives nonresidents a credit against the personal income tax imposed if the nonresident's home state has reciprocal provisions, §11-21-40, thereby meeting the Pennsylvania requirements for statutory credit. Since the class of miners before us has not been subjected to any discrimination we see no justifiable issue as to the effect of the Pennsylvania reciprocity provision.

It is apparent that the lower court based its decision entirely upon the fact that since political subdivisions in West Virginia do not have the power to levy an income tax, there is actually no risk of multiple taxation that would be relevant to the Local Tax Enabling Act of 1965. The lower court of appeals misconstrues the issue. West Virginia does have a **state** income tax purusant to which the petitioners pay to West Virginia a state income tax. West Virginia allows a tax credit against its taxes only if the tax paid outside of West Virginia is to a **state.** It does not apply if the tax is paid to a political subdivision.

The discrimination results from the section of the Pennsylvania statute that provides as follows:

> Payment of any tax or income to any **State other than Pennsylvania** or any political subdivision located outside the boundaries of this Commonwealth, by residents of a political subdivision located in Pennsylvania **shall**, . . . be credited to and allowed as a deduction. . . . (Emphasis added.)

Whatever the bases of each court's decision, it is now clear that the Constitution prevents a state from enacting tax statutes which discriminate against nonresidents in favor of residents of the taxing state.

The reciprocal credit provisions contained in the Local Tax Enabling Act of 1965, December 31, P. L.

1257, Section 511 as amended, pose two questions of constitutional proportion.

> (1) Is it permissible to discriminate between nonresidents and provide for the credit to depend upon whether the state of the nonresidents' abode has reciprocal legislation?[9]
>
> (2) Is it reasonable discrimination between resident and nonresident income taxpayers to grant the former a mandatory credit for income taxes paid in other states on income derived from sources either inside or outside the taxing state when included in the residents' gross income without making the same mandatory provision for a credit to the nonresident who is required to pay income tax in the state of residence upon the very income which is being taxed in the state of its source.[10]

As to the first question, it is urged that a classification of nonresidents based upon the existence or nonexistence of a reciprocal statute in the state of their residence is unreasonable and does not afford equal protection. A similar reciprocal provision of this type was in the New York statute which was condemned in **Travis v. Yale and Towne Mfg. Co.**, 252 U.S. 60, 79-80,

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9. There is an additional discriminatory feature regarding the credit provision "among" nonresidents and "between" residents and nonresidents that violates either the privileges and immunities provision or the equal protection clause of the United States Constitution and the uniformity requirement of the Pennsylvania Constitution. The statute places the granting of the credit to nonresidents within the discretion of the taxing jurisdiction. This could allow one of two nonresidents from the same state to receive a tax credit while it was denied to the other merely because they worked in different political subdivisions within the Commonwealth of Pennsylvania.

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10. The specific language of the statute when referring to residents is "shall be credited to and allowed as a deduction" but when describing the credit of nonresidents it states "may at the discretion of the Pennsylvania political subdivision imposing such tax . . . be credited to and allowed as a deduction . . ."

40 S.Ct. 228 (1920) but the Court did not expressly rule upon the validity of the reciprocating provision.[11]

As to the second issue, it is considered that this type of discrimination is without adequate foundation because it is "a general rule, operating to the disadvantage of all nonresidents, and favoring all residents . . . of the taxing states." **Travis v. Yale and Towne Mfg Co., supra,** at Page 81.

Despite its doctrinaire and encyclopedic nature, the **Travis** case is still the leading authority on this general issue. The Supreme Court in this case considered the constitutionality of two provisions of the New York Tax Law. Section 362 exempted from taxation of residents $1,000 if single and $2,000, if married, and $200 for each dependent. A nonresident had no similar provisions. The Court affirmed the holding of the district court[19] that this section violated the privileges and immunities clause. The discrimination against nonresidents was unreasonable and substantial. "Whether they must pay a tax upon the first $1,000 or $2,000 of income, while their associates and competitors who resided in New York do not, makes a substantial difference." Clearly, the purpose of the privilege and immunities clause is as stated by the Court:

> Beyond doubt those words are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly unmistakably secures and protects the right of a citizen of one state to pass into any other state of the union for the purpose of engaging in lawful commerce, trade, or business without molestation; . . . and

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11. However, the Supreme Court of Illinois expressed the view about the Court in **Travis** had declared the New York provision discriminatory and unconstitutional, while holding that a similar provision in the otherwise invalid Illinois income tax law was in contravention of the Fourteenth Amendment. **Bachrach v. Nelson,** 349 Ill. 579, 182 N. E. 909 (1932).

> to be exempt from any higher taxes or excises than are imposed by the state upon its own citizens.

Further, the Court held that there were no reasonable grounds for diversity of treatment and that "this is not a case of occasional or accidental inequality due to circumstances personal to the taxpayers." **Travis, supra.**

Another example of the use of privileges and immunities clause to bar discriminatory state taxes is that which occurred in **Toomer v. Witsell,** 334 U.S. 385, 68 S.Ct. 1156, 9 L.Ed. 1460 (1948). There South Carolina had sought to impose higher taxes on nonresidents who caught shrimp in the South Carolina marginal seas than upon its own residents. As stated by Chief Justice Vinson:

> The primary purpose of (the privileges and immunities Clause of Article IV, Section 2) . . . was to help fuse into one Nation a collection of independent, sovereign States. It was designed to insure to a citizen of State A who ventures into State B the same privileges which citizens of State B enjoy.

South Carolina sought to justify the discriminatory tax on the grounds that it was designed to conserve the shrimp fisheries by heading off an impending threat of excessive traveling. The Chief Justice disposed of this contention as follows:

> The argument assumes that any means adopted to attain valid objectives necessarily squares with the privileges and immunities clause. It overlooks the purpose of that clause . . . to outlaw classifications based on the fact of noncitizenships unless there is something to indicate that noncitizens constitute a peculiar source of the evil at which the statute is aimed . . .

> We would be closing our eyes to reality, we believe, if we concluded that there was a reasonable relationship between the danger represented by noncitizens as a class, and the severe discrimination practiced upon them.

Similarly, in the case titled **Opinion of the Judges,** 140 N.W. 2d 34 S.D. 629 (1966) a question was propounded by the Governor to the justices of the Supreme Court relating to the constitutionality of statute which determined on the basis of residence what persons are qualified to receive a tax credit under the Property Tax Relief Act. The Court was clear in its decision:

> There is no reasonable basis for the discrimination contained in House Bill 707. It is based solely upon residence, and to the extent of the credit or refund it imposes a higher tax upon the citizens of other states than is imposed on our own. Consequently, we are compelled to advise you that the bill in question violates the quoted provisions of the Constitution of the United States and is in our opinions, "clearly unconstitutional." (Emphasis added.)

The Supreme Court of New Mexico adhered to this principle when it declared in **State v. Ashby,** 73 N.M. 387 P. 2d 588 (1963), that New Mexico Income Tax Act providing personal exemptions for residents but not providing the same exemption for nonresidents violated the privileges and immunities clause of the Federal Constitution and the equal protection clause of the Fourteenth Amendment. The Court stated:

> The Travis case held that the denial of exemptions to the nonresident taxpayers of New York while granting exemptions to the resident taxpayers was a crucial discrimination and was not a case of occasional or accidental inequality due to circumstances personal to the taxpayer.

> We see no way to avoid a conclusion under the doctrine of the Travis case . . . that having imposed the tax upon "every resident and nonresident," the failure to extend exemptions granted residents . . . to nonresident taxpayers bring the New Mexico Act into conflict with Article IV, Section 2, of the Constitution of the United States.

It is axiomatic in American jurisprudence that all classifications made by a state are not unconstitutional. Specifically, the equal protection provision and the privilege and immunities clause would allow reasonable discrimination.[12] Neither provision "preclude(s) disparity of treatment in many situations where there are perfectly valid independent reasons for it. Thus the inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them." **Toomer v. Witsell,** 334 U.S. 385, 396, 68 S.Ct. 1156, 1162, 92 L.Ed. 1460, 1471 (1948). A plethora of carefully reasoned cases have found valid reasons for such discrimination.[13]

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12. In regards to reasonableness and classification of taxation, the Fourteenth Amendment to the federal constitution and the Uniformity clause in the Pennsylvania Constitution stands in **pari materia. Commonwealth v. Fireman's Fund Ins. Co.,** 369 Pa. 60, 87 A 2d 255 (1952).

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13. Consistent with the above principle, it has been held that where the classification results into tax equalization or is peculiarly personal to the resident or nonresident there is no constitutional violation. See **Muliens v. Commonwealth of Kentucky,** 309 U. S. 83, 60 S. Ct. 406, 84 L. Ed. 59 (1939) (Discrimination allowed in the case of in-state and out-of-state bank deposits. The treatment accorded two kinds of deposits may have resulted from the difference in the difficulties and expenses of tax collection) **Anderson v. Tieman,** 182 Neb. 393 155 N. W. 2d 322 (1967) (Deductions were allowed for taxes paid in purchasing food for personal use. "Viewed as a form of state sales tax exemption, the classification between residents and nonresidents as to the credit or refund of sales tax on food for personal use is supported by valid independent reasons other than mere residence"); In **Berry v. State Commission,** 241 Ore. 580, 397 P. 2d 780 (1965) (Allowed personal deductions for residents only.

It suffices here, however, to suggest that the reasons in those cases justifying the discriminatory classification cannot be found.

The nonresident miners receive no direct benefits from Perry Township. They do not get the benefits of attending local schools or enjoying the benefits usually available for residents. Additionally, the nonresident is forced to pay income taxes on the same earned income to the State of West Virginia. Yet, if the credit is denied them they are being asked to bear a greater portion of the tax burden than residents of the Commonwealth of Pennsylvania. Accord. **Borden v. Warner Bros. Theatres,** 345 Pa. 270, 27 A 2d 62 (1942), the Supreme Court of Pennsylvania stated that "uniformity of taxation" means equality of tax burden and a tax to be uniform must operate alike on the classes of things or property subject to it. Moreover, there can be no valid justification by discriminating within the class of nonresidents. Certainly whether State A has a reciprocating statute and State B does not can hardly be seen as a valid reason for this discrimination. In this instance, both taxpayers are burdened with the imposition of double taxation, but the nonresident miners from West Virginia cannot get the benefit of the tax credit because West Virginia has no statute allowing credits for income taxes paid to the political subdivisions of Pennsylvania.

". . . Personal deductions are so clearly related to the state of residence that they should be allowed only by the state residence and not by every other state in which some part of a taxpayer's income might be found and taxed.") **Goodwin v. State Tax Commission,** 286 App. Div. 694, 146 N. Y. S. 2d 172 (1955) (Personal deductions allowed. "The face of residence of the taxpayer within the state is thus a legitimate reason for allowing him to make these special deductions.")

Additionally, additional benefits receive from taxation have been recognized as a valid basis for allowing discriminatory tax rates or exemption. **Borden v. Selden,** 259 Ia 808, 146 N. W. 2d 306 (1966).

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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Morgantown, West Virginia
Counsel for Petitioners

December, 1972

APPENDIX A

UNITED STATES COURT OF APPEALS

For the Third Circuit

No. 71-1846

CONSOLIDATION COAL COMPANY, a corporation

v.

LAWRENCE W. BAILEY, individually and as the representative party of all other persons in the class similarly situated; THE TOWNSHIP OF PERRY, Greene County, Pennsylvania; FLOYD BIRCH, E. D. LEMLEY and L. CARL PHILLIPS, as Supervisors, constituting the Board of Supervisors of said Perry Township; ESTELLA JOHN as Occupational Privilege Tax Collector of said Perry Township; and DON WILKINSON as Earned Income Tax Collector for said Perry Township,

LAWRENCE W. BAILEY, individually and as the representative party of all other persons in the class similarly situated, Appellant

---

(D. C. Civil Action No. 70-1144)

Appeal From the United States District Court
For the Western District of Pennsylvania

Argued September 14, 1972
Before McLaughlin, Adams and Gibbons,
Circuit Judges

OPINION OF THE COURT

(Filed September 27, 1972)

Per Curiam:

Appellant Bailey, a class action defendant in an interpleader action, appeals the determination by the district court that the Township of Perry, Pennsylvania, the adverse claimant to the interpleaded fund, was entitled thereto. The fund consists of monies withheld from wages earned by the class members from Consolidation Coal Company, the plaintiff in interpleader.[1] The wages were withheld pursuant to tax ordinances passed by the Township of Perry on the authority of the Local Tax Enabling Act of 1965, 53 Pa. Stat. Ann. §6901 et seq. (Supp. 1972). One ordinance levied a one per cent tax on the income of nonresidents earned for services rendered in the Township. The other levied an occupational privilege tax of $10 per person on all persons, resident and nonresident, laboring in Perry. Pursuant to the ordinances the taxes were withheld by Consolidation. The amounts withheld are claimed both by the Township and by the wage earners.

Consolidation, a Delaware corporation, operates the Humphrey mine, which was originally opened in West Virginia, but which was eventually extended, underground, across the state line into Perry Township, Pennsylvania. The mine has ventilator shafts, a portal, a washhouse, and a parking lot in Perry Township, but all coal mined in Pennsylvania is removed underground to West Virginia where it is processed for sale. The appellant and the class he represents are West Virginia residents who work in the Humphrey mine. They enter

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1. The matter was before this court previously on the issue of jurisdiction under 28 U. S. C. §1355, **Consolidation Coal Company v. Bailey**, Nos. 71-1193, 71-1304 (3d Cir., filed June 8, 1971).

the mine through the portal in Perry and work underground extracting coal entirely within that Township. West Virginia and Pennsylvania have an informal agreement with respect to mines extending across the state line that the state in which the mine was first opened shall have jurisdiction over the entire mine with respect to mine safety regulations.

The nonresident miners claim that as a matter of due process of law Pennsylvania lacks jurisdiction to tax and that the tax is on interstate coal mining in violation of the commerce clause. The district court rejected these contentions. We affirm.

A state can tax income produced within its borders, and can tax the income of nonresidents from occupations carried on within its borders. **International Harvester Co. v. Wisconsin,** 322 U.S. 435 (1944); **Non-Resident Taxpayers Assoc. v. Philadelphia,** 341 F. Supp. 1139 (D.N.J. 1971). The taxing power extends to activities which are in interstate commerce, provided that the state has exerted its power only in proportion to activities within its borders; and as to which activities it has afforded opportunity and protection. **E.g., General Motors v. Washington,** 377 U.S. 436 (1964); **Wisconsin v. J. C. Penney Co.,** 311 U.S. 435 (1940); **Pan American World Airways v. Government of Virgin Islands,** 459 F. 2d 387 (3d Cir. 1972). Clearly here, where the miners work at extracting Pennsylvania coal entirely within the boundaries of Perry Township, Pennsylvania, enter the mine through a portal in that Township, use a Perry Township washhouse, a Perry Township parking lot and Perry Township roads to get to work, there is a sufficient nexus for the imposition of a tax. Appellant relies principally upon the informal understanding between Pennsylvania and West Virginia by which the

latter has mine safety enforcement responsibility. That agreement, however, is an administrative convenience irrelevant to the issue of Pennsylvania's power to tax. There is no contention that the small tax here involved imposes so great a burden on interstate commerce in coal as to amount to a discrimination against such commerce. The commerce clause does not relieve those engaged in interstate commerce from a just share of the state tax burden. **Western Live Stock v. Bureau of Revenue,** 303 U.S. 250, 254 (1938).

Appellants also contend that the Pennsylvania Enabling Act deduction provision, 53 Pa. Stat. Ann. §6914 (Supp. 1972), is violative of the equal protection and privileges and immunities clauses of the United States Constitution because it provides that a Pennsylvania resident receives a credit for out-of-state income taxes he pays, whereas a nonresident is given such credit only if the state where he paid the tax has a reciprocal provision giving Pennsylvania residents a similar credit. This, appellants argue, subjects nonresidents to the risk of multiple taxation from which residents are protected. The risk to which they refer, however, is entirely hypothetical. Political subdivisions of West Virginia do not have the power to enact either a personal income tax or an earned income tax, W. Va. Code Ann., §§11-8-1 et seq., 11-21-1 et seq. (1966); and the state gives nonresidents a credit against the personal income tax it imposes if the nonresident's home state has reciprocal provisions, §11-21-40, thereby meeting the Pennsylvania requirements for statutory credit. Since the class of miners before us has not been subjected to any discrimination we see no justiciable issue as to the effect of the Pennsylvania reciprocity provision.

The judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS

For the Third Circuit

No. 71-1846

CONSOLIDATION COAL COMPANY, a corporation

vs.

LAWRENCE W. BAILEY, individually and as the representative party of all other persons in the class similarly situated; THE TOWNSHIP OF PERRY, Greene County, Pennsylvania; FLOYD BIRCH, E. D. LEMLEY and L. CARL PHILLIPS, as Supervisors, constituting the Board of Supervisors of said Perry Township; ESTELLA JOHN as Occupational Privilege Tax Collector of said Perry Township; and DON WILKINSON as Earned Income Tax Collector for said Perry Township

LAWRENCE W. BAILEY, individually and as the representative party of all other persons similarly situated, Appellant

---

(D.C. Civil Action No. 70-1144)

On Appeal From the United States District Court
For the Western District of Pennsylvania

Present: McLaughlin, Adams and Gibbons, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed August 11, 1971, be, and the same is hereby affirmed, with costs taxed against appellant.

Attest:

THOMAS F. QUINN,
Clerk

September 27, 1972

JAN 22 1973

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-906

CONSOLIDATION COAL COMPANY, a corporation,

v.

LAWRENCE W. BAILEY, individually and as the representative party of all other persons in the class similarly situated; THE TOWNSHIP OF PERRY, Greene County, Pennsylvania; FLOYD BIRCH, E. D. LEMLEY and L. CARL PHILLIPS, as Supervisors, constituting the Board of Supervisors of said Perry Township; ESTELLA JOHN as Occupational Privilege Tax Collector of said Perry Township; and DON WILKINSON as Earned Income Tax Collector for said Perry Township

LAWRENCE W. BAILEY, individually and as the representative party of all other persons in the class similarly situated,

Petitioners.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-906

CONSOLIDATION COAL COMPANY, a corporation,

v.

LAWRENCE W. BAILEY, individually and as the representative party of all other persons in the class similarly situated; THE TOWNSHIP OF PERRY, Greene County, Pennsylvania; FLOYD BIRCH, E. D. LEMLEY and L. CARL PHILLIPS, as Supervisors, constituting the Board of Supervisors of said Perry Township; ESTELLA JOHN as Occupational Privilege Tax Collector of said Perry Township; and DON WILKINSON as Earned Income Tax Collector for said Perry Township

LAWRENCE W. BAILEY, individually and as the representative party of all other persons in the class similarly situated,

Petitioners.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit appears at 467 F.2d 1124 (3rd cir., 1972). The opinion of the United States District Court for the Western District of Pennsylvania appears at 330 F. Supp. 474 (1971).

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered September 27, 1972. The Petition for Writ of Certiorari was filed on December 20, 1972 and a copy thereof was received by Respondents' counsel on December 22, 1972.

The Petitioner is invoking the jurisdiction of this Court pursuant to 28 USC §1254(1).

QUESTIONS PRESENTED

1. Whether Perry Township, a political subdivision of the Commonwealth of Pennsylvania, has the power to tax non-resident miners who work in Perry Township.

2. Whether Pennsylvania's Local Tax Enabling Act requires non-residents to bear a greater portion of the tax burden than Pennsylvania residents.

STATEMENT OF THE CASE

The Parties

Consolidation Coal Company (hereinafter "Consol") is a Delaware corporation engaged in the mining of coal in the Humphrey Mine located beneath the surface of Perry Township, Greene County, Pennsylvania (Res. App. 8a).

Lawrence W. Bailey, a resident of West Virginia, is employed as a miner at the Humphrey Mine and is the representative of all West Virginia residents employed as miners at such mine (hereinafter collectively referred to as the "miners") (Res. App. 8a).

Perry Township is a political subdivision of the Commonwealth of Pennsylvania and all individuals, other than Bailey, are the supervisors or tax collectors of Perry Township (hereinafter collectively referred to as the "taxing authorities") (Res. App. 8a).

The Nature of the Action

Consol initiated this action in the United States District Court for the Western District of Pennsylvania by interpleading the miners and the taxing authorities as adverse claimants (Res. App. 9a). The jurisdictional fund consisted of the proceeds of Perry Township's 1% Earned Income Tax and its Occupational Privilege Tax which Consol withheld from the miners' wages (Res. App. 8a). The Earned Income Tax applies to the ". . . salaries, wages, commissions and other compensation earned by . . . [persons] within Perry Township. . . ." (Res. App. 8a). The Occupational Privilege Tax is predicated on ". . . the privilege of engaging in an occu-

pation within the Township of Perry. . . ." (Res. App. 8a).

The District Court, pursuant to a Memorandum Order of the United States Court of Appeals for the Third Circuit[1] accepted jurisdiction of the case, permitted the interpleader and on June 30, 1971, discharged Consol and awarded the fund to the taxing authorities[2] (Res. App. 31a, 32a).

Because of the Petitioners' failure to include citations to the record in the Petition and because of Petitioners' numerous misstatements of the facts as found by the District Court and adopted by the Court of Appeals, it is necessary to recite in this brief the factual basis on which the Court of Appeals affirmed the decision of the District Court.

Contrary to the assertions contained in the Petition for Writ of Certiorari, the District Court did not find that the miners paid an income tax to the State of West Virginia, did not find that they worked in a West Virginia mine and did not find that the employment contracts are made and enforced under the laws of West Virginia. Furthermore, the case does not involve taxation by school districts as asserted on Page 29 of the Petition. The District Court found, and the Court of Appeals adopted the findings of the District Court, that; the miners work extracting Pennsylvania coal entirely within

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1. A copy of The United States Court of Appeals' Memorandum Order at Nos. 71-1193 and 71-1304 is reprinted in the Appendix starting at Pg. 1a.

2. A copy of the United States District Court's opinion, conclusions of law, and findings of fact is reprinted as Appendix B starting at Pg. 7a.

the boundaries of Perry Township (Pet. App. 3a), the miners enter the mine in Perry Township, use a Perry Township bathhouse, a Perry Township parking lot and Perry Township roads (Res. App. 9a). The Court also found that Perry Township provides police and fire protection to the miners and provides them all other services generally provided to persons who reside in, own property in or work in Perry Township (Res. App. 10a). Consol pays taxes to Perry Township on the coal which is located in Perry Township (Res. App. 10a). There is an informal understanding between Pennsylvania and West Virginia by which the latter has mine-safety enforcement responsibilities (Res. App. 14a). The Court of Appeals determined that this informal agreement is an administrative convenience irrelevant to the issue of Pennsylvania's power to tax (Pet. App. 3a, 4a).

ARGUMENT

The Petition for Writ of Certiorari Should Be Denied Because (a) Perry Township Has a Valid Constitutional Basis for Taxing the Miners; (b) The Decision of the Court of Appeals Does Not Conflict With Any Decisions of This Court; and (c) The Decision of the Court of Appeals Will Not Have a Deleterious Effect on the Constitutional Rights of the Miners.

Simply stated, the Petition raises two questions, both of which were correctly answered by the Court of Appeals; namely, whether Perry Township, a political subdivision of the Commonwealth of Pennsylvania, has the power to tax non-resident miners who work in Perry Township and whether Pennsylvania's Local Tax Enabling Act requires non-residents to bear a greater portion of the tax burden than Pennsylvania residents.

I.

PERRY TOWNSHIP HAS THE POWER TO TAX THE MINERS IN THE CASE AT BAR.

The Court of Appeals held that "A state can tax income produced within its borders, and can tax the income of non-residents from occupations carried on within its borders." (Pet. App. 3a). This Court, in *Shaffer v. Carter*, 252 U.S. 37, 52; 40 S.Ct. 221 (1920) held:

> And we deem it clear, upon principle as well as authority, that just as a State may impose general income taxes upon its own citizens and residents whose persons are subject to its control, it may, as a necessary consequence, levy a duty of like character, and not more onerous in its effect, upon in-

comes accruing to non-residents from their property or business within the State, or their occupations carried on therein; enforcing payment, so far as it can, by the exercise of a just control over persons and property within its borders. This is consonant with numerous decisions of this court sustaining state taxation of credits due to non-residents, *New Orleans v. Stempel,* 175 U.S. 309, 320, *et seq.; Bristol v. Washington County,* 177 U.S. 133, 145; *Liverpool &c. Ins. Co. v. Orleans Assessors,* 221 U.S. 346, 354 . . .

There is no question that the Perry Township has the constitutional power to assess the taxes in question. The miners enjoy substantial benefits provided by Perry Township. The District Court found that Perry Township provides the miners with fire and police protection, road maintenance and all other services generally provided to persons residing in Perry Township (Res. App. 10a). The attempt of the Petitioners to obfuscate the issue by failing to accurately state the facts, as found by the District Court, and by failing to include appropriate record citations can not withstand scrutiny once the findings of fact are reviewed. The miners attempt to avoid the consequences of the findings of the District Court by relying principally upon the informal understanding between Pennsylvania and West Virginia by which the latter has mine-safety enforcement responsibility. However, as the Court of Appeals found, that agreement is an administrative convenience irrelevant to the issue of Pennsylvania's power to tax (Pet. App. 4a).

The fact that West Virginia provides workman's compensation benefits, unemployment compensation

benefits and black lung compensation benefits to the miners is not relevant for the reason that the miners or their employer pay to the State of West Virginia appropriate taxes to cover such benefits and the State of Pennsylvania makes no attempt to tax either the miners or their employer for such benefits (Res. App. 16a). In truth, the fact that the miners do not receive such benefits from the Commonwealth of Pennsylvania has nothing whatsoever to do with the right of Perry Township to assess and collect the taxes in question.

II.

Pennsylvania's Local Tax Enabling Act Does Not Provide for Disparate Treatment Between Residents and Non-Residents.

The Court of Appeals held that the possibility that the Pennsylvania Act subjects non-residents to the risk of multiple taxation as urged by the miners is entirely hypothetical since the miners have not been subjected to any alleged discrimination (Pet. App. 4a). Consequently, the Court concluded that there was no justifiable issue concerning the effect of the Pennsylvania reciprocity provision (Pet. App. 4a). In fact, the complicated provisions of Pennsylvania's Local Tax Enabling Act, 53 P.S. §6914, merely protect Pennsylvania citizens from multiple wage or income taxation. They provide:

1. That Pennsylvania citizens who live in one local taxing authority shall pay local wage or income taxes in their place of residence rather than their place of work. Paragraphs 2 and 3 of §6914 provide that the place of work must grant a tax credit in the amount of

the local wage or income tax paid at the place of residence.

2. That Pennsylvania citizens who live in a local taxing authority, but who work out of state, shall pay wage or income taxes to the other state rather than to Pennsylvania. Thus, paragraph 5 of §6914 provides that residents of local taxing authorities receive credit for wage or income taxes paid to local taxing authorities outside Pennsylvania. Similarly, Pennsylvania residents receive credit for wage or income taxes paid to other states. (The latter provision now seems unnecessary, in light of the identical credit provided in the new Pennsylvania state income tax, 53 P.S. §7308).

Nothing in the Pennsylvania statute precludes West Virginia from using similar credit provisions to protect its citizens. It is up to West Virginia to protect its citizens from multiple taxation.

3. That nonresidents of Pennsylvania may be credited in the amount of taxes paid to their states, if their states provide similar credit to Pennsylvania citizens. This is the provision which the miners attack as one which imposes greater burdens upon nonresidents than upon residents. It does not do so. In effect, it permits nonresidents to pay taxes at their place of residence rather than their place of work—if their place of residence permits Pennsylvania residents to do the same, and if the local Pennsylvania authority so desires. If the Pennsylvania authority refuses to enact such a provision, the basic rule applies: both residents and nonresidents will pay taxes at the place of work rather than the place of residence. Nonresidents will not make

multiple payments, unless their own state laws are inadequate to protect them.[3]

The miners complain that the reciprocity provision benefits Pennsylvania at the expense of West Virginia. To the contrary, it merely protects Pennsylvania from being exploited by West Virginia. If Pennsylvania localities were required to give West Virginia residents a credit for taxes paid in West Virginia—as the miners contend—the result would be that Pennsylvania residents working in West Virginia would pay wage and income taxes to West Virginia, while West Virginia residents working in Pennsylvania would also pay wage and income taxes to West Virginia. In short, West Virginia would always be favored over Pennsylvania where the residents of one state worked in the other. Pennsylvania's reciprocity provision properly avoids this result.

It is thus incorrect to say, as the miners do, that nonresidents are being asked to bear a greater portion of the tax burden than residents of the Commonwealth of Pennsylvania. The miners' equal protection argument fails because it is based on an incorrect factual premise.

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3. West Virginia does in fact protect its citizens by providing a credit for state income taxes paid to other states: West Va. Code, §11-21-20. Furthermore, the record does not reflect, and the miners do not contend, that the miners pay local wage or income taxes in West Virginia. Thus, on the facts of this case, the miners are not subject to multiple taxation. Political subdivisions of the State of West Virginia do not have the power to enact either a personal income tax or an earned income tax: West Va. Const. Article X, Section 9; West Va. Code, §§ 11-8-1 to 11-8-33.

CONCLUSION

The Petitioners' arguments are completely without substance. The appeal to the Court of Appeals was frivolous. The Petition for a Writ of Certiorari is equally without merit. It is respectively submitted that the Petition for Writ of Certiorari must be denied.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD DISTRICT

Nos. 71-1193 and 71-1304

CONSOLIDATION COAL COMPANY, a corporation

v.

LAWRENCE W. BAILEY, individually and as the representative party of all other persons in the class similarly situated; THE TOWNSHIP OF PERRY, Greene County, Pennsylvania; FLOYD BIRCH, E. D. LEMLEY and L. CARL PHILLIPS, as Supervisors, constituting the Board of Supervisors of said Perry Township; ESTELLA JOHN as Occupational Privilege Tax Collector of said Perry Township; and DON WILKINSON as Earned Income Tax Collector for said Perry Township.

CONSOLIDATION COAL COMPANY, a corporation, *Appellant* in No. 71-1193

LAWRENCE W. BAILEY, individually and as the representative party of all other persons in the class similarly situated, *Appellant* in No. 71-1304.

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued May 21, 1971

Before HASTIE, VAN DUSEN and ADAMS, *Circuit Judges*

Memorandum Order

The February 1, 1971, district court order from which this appeal is taken grants the motion of Perry Township (Greene County, Pennsylvania), its supervisors and tax collectors, to dismiss this interpleader action and directs the plaintiff to pay to such Township over $6,090. withheld, on account of taxes upon the privilege of engaging in an occupation within the Township, from the wages of its West Virginia resident employees working in Perry Township and approximately $49,500. on account of a 1% income tax of such Township upon wages earned in the Township by such nonresidents. The interpleader action, filed under 28 U. S. C. § 1335, joined the above-mentioned defendants who filed the above-described motion and the employee-residents of West Virginia as adverse claimants, since each of these claimants contends that they are entitled to the above-described wages withheld by the plaintiff-employer, which alleges that it has no interest in the fund and seeks a judicial determination as to which of the claimants is entitled to receive the fund. The district court acted in reliance upon *Consolidation Coal Co. v. Bailey,* 308 F. Supp. 1251, 1252-53 (N. D. W. Va., N. D., 1970),[1] and upon a decision of the Green County, Penn-

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1. The background facts are stated in this opinion. Since the West Virginia federal court decided it "should refrain from accepting jurisdiction," dismissal of that action for lack of jurisdiction precludes application of principles of res judicata to such decision. See *Wade v. Rogala,* 270 F. 2d 280, 282 (3d Cir. 1959). Also, the court noted that the action in the Pennsylvania state court was pending but had not been decided at the time of its decision, so that the record in this Western Dis-

sylvania, trial court for the Township in an action brought by it against plaintiff and the employees.[2]

The record makes clear that the district court had jurisdiction of the action under 28 U. S. C. § 1335 (cf. F. R. Civ. P. 22) in view of the diversity of citizenship of the claimants, who allege that they are entitled to the above-described withheld wages, and the filing by plaintiff of a bond in the amount of $55,584.93. See *State Farm Fire & Cas. Co. v. Tashire,* 386 U. S. 523, 530-34 (1967). Also, on this record plaintiff is entitled to a judgment discharging it from all further liability as to the wages withheld in the amount of such bond. See 28 U. S. C. § 2361; *Bank of China v. Wells Fargo Bank & Union Trust Co.,* 209 F. 2d 467, 473 (9th Cir. 1953); *Equitable Life Assurance Soc. of U. S. v. Miller,* 229 F. Supp. 1018 (D. Minn. 1964); *Rosenberger v. Northwestern Mutual Life Ins. Co.,* 176 F. Supp. 379 (D. Kan. 1959); *Savannah Bank & Trust Co. v. Block,* 175 F. Supp. 798 (D. Ga. 1959); *cf. Griffin v. McCoach,* 313 U. S. 498, 499 (1941). In *E. J. Van Ingen & Co. v. Connolly,* 225 F. 2d 740, 744-45 (3d Cir. 1955), this court stated:

". . . [T]he normal duty of a district court [is] to permit interpleader liberally to relieve parties of the hazards and vexations of conflicting claims

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trict of Pennsylvania action is quite different from that on which the above cited February 5, 1970, decision was based.

2. In this action, only Mr. Bailey had been served personally and the employees had failed to appear, after receiving notice by publication in a newspaper in Perry Township (as opposed to a newspaper published in their West Virginia county of residence). The plaintiff Coal Company took no appeal in that action, having adopted the position that it was a stakeholder.

> against them. . . . [T]he Federal Interpleader Act should be construed and applied liberally 'first, to relieve a stakeholder without interest from present litigation, and secondly, to relieve such a one from future litigation by adjudicating the claims of all parties in one suit.' "

In the *Tashire* case, *supra*, the court said at page 533:

> "[T]he language of the present statute . . . is remedial and to be liberally construed."

On the facts of this record,[3] where any injunction would only protect plaintiff (a withholding employer, as opposed to the basic taxpayers) against a multiplicity of suits with reference to moneys withheld in the past on demand of a taxing authority, the terms of 28 U. S. C. § 1341 do not preclude the jurisdiction of the district court to determine this controversy over this fund of withheld wages in accordance with 28 U. S. C. §§ 1335 and 2361. See *Builders and Developers Corp. v. Manassas Iron & Steel Co.*, 208 F. Supp. 485, 491-92 (D. Md. 1962); *cf. Miller v. Nut Margarine Co.*, 284 U. S. 498 (1932); *Shelton v. Gill*, 202 F. 2d 503 (4th Cir. 1953); *Adler v. Nicholas*, 166 F. 2d 674 (10th Cir. 1948); *Glenn v. American Surety Co.*, 160 F. 2d 977 (6th Cir. 1947).

We cannot overlook the fact that this matter has been in litigation in five previous suits since March 1969 and the taxing authority, in vital need of the withheld

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3. It is noted that the taxpayer employees only claim the refund of the portion of wages withheld in the past on acount of taxes, as opposed to an injunction against the future enforcement of the tax, and it seems clear that they are limited to such claim in this interpleader action.

fund (which is a substantial part of its budget) still has not received a determination of its claim. Also, we cannot say on this record that the claims raised by the taxpayer-employees, particularly the claims that they were denied adequate notice required by the due process clause in the Pennsylvania state court actions (see footnote 2 above), are frivolous.[4]

The district court order of February 1, 1971, is vacated and the case remanded for proceedings, including a prompt trial and opportunity for argument, consistent with this Memorandum Order. The certified judgment in lieu of a formal mandate will issue forthwith.

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4. The following terms of Rule 2230(a) of the Pennsylvania Rules of Civil Procedure raise some doubt on the ability of the Pennsylvania state courts to render a class action decision in this controversy with binding in personam effect on a class of non-residents such as these West Virginia taxpayers:

> "(a) If persons constituting a class are so numerous as to make it impracticable to join all as parties, any one or more of them who will adequately represent the interest of all may sue or be sued on behalf of all, but the judgment entered in such action shall not impose personal liability upon anyone not a party thereto."

See *Spector Motor Service v. O'Connor,* 340 U. S. 602, 605 (1951), where the court said: "The United States District Court had jurisdiction over this case in the first instance because of the uncertainty of the adequacy of a remedy in the state courts, and it did not lose that jurisdiction by virtue of the later clarification of the procedure in the courts of Connecticut"; *see also Georgia R. Co. v. Redwine,* 342 U. S. 299, 303 (1952); *cf. Denton v. City of Carrollton, Georgia,* 235 F. 2d 481, 486-87 (5th Cir. 1956).

Memorandum Order.

Judge Hastie dissents because he believes the granting of relief in this case would be contrary to the intendment of Section 1341 of Title 28 U. S. C.

BY THE COURT,

FRANCIS L. VAN DUSEN
Circuit Judge

Dated: June 7, 1971

APPENDIX B

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

CONSOLIDATION COAL COMPANY, a corporation, Plaintiff, v. LAWRENCE W. BAILEY, individually and as the representative party of all other persons in the class similarly situated; THE TOWNSHIP OF PERRY, Greene County, Pennsylvania; FLOYD BIRCH, E. D. LEMLEY and L. CARL PHILLIPS, as Supervisors, constituting the Board of Supervisors of said Perry Township, ESTELLA JOHN as Occupational Privilege Tax Collector of said Perry Township; and DON WILKINSON as Earned Income Tax Collector for said Perry Township, Defendants	Civil Action No. 70-1144

Findings of Fact and Conclusions of Law

*Findings of Fact**

1. The plaintiff in this interpleader action is Consolidation Coal Company ("Consol"), a Delaware corporation engaged in the mining of coal at the Humphrey

* The 14 Findings of Fact, marked with an asterisk are agreed to by all parties. Bailey agrees to 6 additional findings and Consol to 2 (see page 5).

Mine located in Perry Township, Greene County, Pennsylvania (Jt. App. 75a, 77a, 79a, 187a).**

2. Lawrence W. Bailey ("Bailey") is a miner, and a representative of all miners who reside in West Virginia and work at the Humphrey Mine in Pennsylvania (Jt. App. 25a, 27a).

3. Bailey has adequately represented the class throughout this and prior proceedings.

*4. The Township of Perry is a political subdivision of the Commonwealth of Pennsylvania, and the individual defendants other than Bailey are the supervisors and tax collectors for the township (collectively referred to as the "taxing authorities") (Jt. App. 75a).

*5. In December of 1968, Perry Township enacted a 1% Earned Income Tax payable by non-residents for services rendered within the township (Jt. App. 76a-77a, 111a-134a) and an Occupational Privilege Tax (Jt. App. 76a, 103a-110a).

*6. The Earned Income Tax is levied upon "net profits earned after January 15, 1969, from businesses, professions, and other activities conducted by . . . non-residents within Perry Township, and on salaries, wages, commissions and other compensation earned by . . . non-residents within Perry Township" (Jt. App. 111a).

*7. The Occupational Privilege Tax is levied upon "the privilege of engaging in an occupation within the Township of Perry" (Jt. App. 103a).

** Such references are to the Joint Appendix used at the appeal of this Court's granting of the motion to dismiss herein.

8. Consol has, since March 17, 1969, withheld the taxes as required by the Earned Income Tax resolution and the Occupational Privilege Tax ordinance, but has refused to deliver the taxes collected to the taxing authorities (Jt. App. 76a).

9. In this action Consol seeks to interplead the taxing authorities and the miners as purportedly adverse claimants to the fund, which consists of Earned Income and Occupational Privilege Taxes withheld from the miners wages as of the date of the complaint, as well as "such additional amounts of taxes imposed by Perry Township as plaintiff shall in the future withhold from the wages of its employees who are members of the class" (Jt. App. 10a-12a).

*10. The fund which Consol attempts to interplead herein currently totals more than $60,000.00 in taxes withheld.

11. The Township's total operating governmental budget for the year 1970 was approximately $62,500.00 (Jt. App. 76a).

*12. The class members are residents of West Virginia who work as miners in the Humphrey Mine. They are required for employment purposes to travel to the mine's Mount Morris (Pennsylvania) portal to commence their work (Jt. App. 54a-55a).

*13. Annexed to said portal is a bath house which is used by the miners to change clothes before descending down the portal's elevator to the situs or work. (Jt. App. 55a).

*14. The coal presently being mined in the Humphrey Mine is geographically located under the surface of Perry Township (stipulation on appeal).

*15. At all times since March of 1969, the coal being mined in the Humphrey Mine has been geographically located under the surface of Perry Township.

*16. All of the coal which is being mined in the Humphrey Mine is transported via haulage ways under Perry Township, then under Dunkert Township, Greene County, Pennsylvania; and finally into Cass District, Monongalia County, West Virginia.

17. All of the coal being mined in the Humphrey Mine, and all surface installations in Perry Township are assessed in Perry Township, and Consol pays taxes to Perry Township, to the Central Greene School District and to Greene County on all such properties.

18. Consol's properties in Perry Township include the Mount Morris portal; a new portal northwest by west of the Mount Morris portal—i.e., further into Perry Township; substations known as bore holes which are used to conduct electricity to the mines and which are placed approximately every 3,000 feet along the haulage ways; and ventilation substations which include fans required by federal regulations to move at least 9,000 cubic feet of air per minute from the mines.

19. Perry Township maintains the roads to and from Consol's installations, provides police and fire protection to Consol and its employees, including the miners, and provides them with other services generally provided to persons who reside in, own property in or work in Perry Township.

20. The basic argument of the miners is that the taxes levied by Perry Township are unconstitutional in that the Township does not have a sufficient jurisdictional nexus with the miners.

21. It is the contention of the miners that portaling in Mount Morris is the only taxable event, that once the miners descend into the mine (which is under Perry Township) they are within the regulatory jurisdiction of West Virginia, and that entrance into the mine through a Pennsylvania portal does not give Pennsylvania jurisdiction to tax the miners.

22. The taxing authorities contend that the most important nexus or taxable event or incident is the miners' working in Perry Township.

23. All members of the class of miners work in Perry Township.

*24. Consol has agreed to pay into court all monies withheld up to the date of its discharge, if any, and to include in such payments the earnings which have accumulated upon such withheld funds.

*25. Consol agrees to waive any claim to counsel fees arising out of this litigation.

*26. Consol agrees that, if a final judgment on the merits is entered in this action in favor of the taxing authorities, it will continue to withhold the taxes and to pay them over as required by the ordinance and resolution of Perry Township.

*27. At the hearing held on June 21, 1971, certain stipulations were made and all parties agreed that they had not further evidence to adduce on the merits of this case; and all parties agreed that the record was sufficient for this Court to decide the case on its merits.

28. All miners currently working at the Humphrey Mine were mailed a notice inviting them to appear

at the June 21 hearing. Nobody other than Bailey and his counsel appeared in response to the invitation.

THE FOLLOWING FINDINGS OF FACT ARE STIPULATED TO BY COUNSEL FOR BAILEY: NUMBERS 1-16, 24-27.

THE FOLLOWING FINDINGS OF FACT ARE STIPULATED TO BY COUNSEL FOR CONSOL: NUMBERS 4, 5, 6, 7, 10, 12, 13, 14, 15, 16, 17, 18, 24, 25, 26, 27.

Conclusions of Law

1. The Memorandum Order of the Court of Appeals herein, dated June 7, 1971, precludes this Court from dismissing for want of jurisdiction under 28 U.S.C. Section 1341 and this Court therefore denies the taxing authorities' motion to dismiss on the basis of Section 1341.

2. In light of the opinion of the Court of Appeals, the asserted res judicata effect of the Greene County judgments (rendered in cognate cases) is irrelevant to the disposition of the case, and this Court therefore denies the taxing authorities' motion to dismiss on the basis of the prior adjudications.

3. The findings of fact demonstrate that there is sufficient "nexus" or "taxable event" or "incident" for the taxing authorities to impose taxes upon the miners who work in the Humphrey Mine in Pennsylvania.

4. The constitutional argument advanced by the miners is without merit. The taxes are valid and constitutional.

5. The miners are not meritorious claimants to the fund of withheld taxes herein.

Additional Findings of Fact.

6. The Court of Appeals has mandated that Consol is entitled to be discharged.

7. Consol's discharge is conditioned upon payment into Court of all taxes withheld plus the earnings accrued upon such funds prior to September 28, 1970, or the statutory interest of 6%, whichever is greater, plus the earnings accrued from September 28, 1970 to the date of payment into Court.

8. The taxing authorities are entitled to the fund interpleaded.

9. Nothing herein shall be deemed to preclude the taxing authorities from claiming additional interest under the provisions of the taxing ordinance and resolution at issue here or under the Local Tax Enabling Act of 1965.

DUMBAULD,
U.S.D.J.

Additional Findings of Fact

1. Consolidation Coal Company is a corporation doing business in West Virginia and conducting extensive mining operations in West Virginia under the laws of West Virginia.

2. The Consolidation Coal Company, through its operating division, Christoper Coal Company, is engaged in the mining of coal in Monongalia County, West Virginia at what is commonly known as the Humphrey Mine.

3. The Humphrey Mine was originally opened in West Virginia and presently all coal taken from the

mine is removed in West Virginia and processed and shipped from West Virginia.

4. The present shafts within Pennsylvania which penetrate the coal seam worked in the Humphrey Mine are used exclusively for ingress and egress of personnel and for ventilation but not for the removal of coal.

5. There is an informal agreement bearing upon jurisdiction of mines that cross state boundaries between the State of West Virginia and the Commonwealth of Pennsylvania. This agreement is recognized and acted upon by the authorities of these states who are charged with the enforcement of State mining laws. This agreement provides that the State where the original opening of a mine occurs asserts jurisdiction over the entire mine, even though mining operations may proceed under the other state so long as the company that is conducting such mining operations is present and doing business in the State of the original opening under this agreement and consequently the mine originally opened in West Virginia is under the jurisdiction of West Virginia mining laws, even though mining operations occur under the Commonwealth of Pennsylvania.

6. So far as state laws are concerned, the Humphrey Mine is operated exclusively under the laws of the State of West Virginia Department of Mines.

7. The miners are residents and taxpayers of the State of West Virginia.

8. The miners are and have been continuously employed by Consolidation Coal as miners in the Humphrey Mine and are required for employment purposes to travel to Mt. Morris, Pennsylvania to commence their work.

Additional Findings of Fact.

9. The travel time from the West Virginia border to the Mt. Morris portal is approximately three minutes.

10. Annexed to the Mt. Morris portal is a bathhouse that is used by the miners to change clothes before descending down the portal to the situs of work.

11. Pursuant to the National Bituminous Coal Wage Agreement of 1968, to which Consolidation and the miners are parties, the bathhouse is furnished to the miners by Consolidation Coal Company.

12. The said agreement provides:

> There shall be no charge by the operator (Consolidation Coal) for use of a bathhouse or washroom. The operator will furnish soap in the bathhouses or if washrooms are not furnished by the operator, other satisfactory arrangements will be made between the operator and the district (page 38)

13. The average time spent in the bathhouse is approximately five minutes. The miners then enter the mine by way of a portal elevator.

14. The pay period for the miners does not begin until there is an entrance on the portal elevator.

15. The said agreement between Consolidation Coal Company and the miners provide:

> Wages and Hours
>
> (a) For all inside employees a work day of eight hours from portal to portal which means collar to collar or bank to bank, is established including a staggered thirty minutes for lunch, and without any intermission or suspension of operation throughout the day. (page 18)

Additional Findings of Fact.

16. Originally, all portals of entry into the Humphrey Mine were located in West Virginia and the Mt. Morris portal was constructed to save Consolidation Coal Company wasted manpower hours in travel from the portal to the actual situs of work.

17. The miners are members of the United Mine Workers of America, Local District 31. This District is headquartered in Fairmont, West Virginia and the jurisdiction of this District extends only to West Virginia mines.

18. The miners receive no benefits from the Commonwealth of Pennsylvania or its political subdivision such as workmen compensation, unemployment, black lung compensation, and other benefits and privileges given to miners who work under the jurisdiction of the State of Pennsylvania Department of Mines and Mineral Industries.

19. 335 miners all employed by Consolidation Coal Company and all using the Mt. Morris portal are residents of West Virginia including their representative, Lawrence W. Bailey.

20. Consolidation Coal Company is withholding and accumulating from the miners' wages an amount totaling over $60,000 pursuant to an occupational and non-resident income taxes imposed by Perry Township, Greene County, Pennsylvania.

22. The Perry Township income tax upon wages earned by nonresidents is levied against all income of the miners during the year. As such, the vacation pay of the miners is included.

23. The miners are entitled to an annual vacation of fourteen days. In addition to the fourteen days, the

miners are entitled to an additional day of vacation for each year over ten (10) that he has worked continuously. The maximum additional days for vacational purposes per year are ten (10).

24. The State of West Virginia levies a personal property tax on all personal property used in the Humphrey Mine.

25. The State of West Virginia levies a business and occupational tax against Consolidation Coal based on the amount of coal produced from the Humphrey Mine.

DUMBAULD, USDJ

June 30, 1971

Opinion

DUMBAULD, J.

This judicial odyssey had its genesis in the attempt of the township of Perry, in Greene County, Pennsylvania, to extract an earned income and occupational privilege tax (collectible through withholding by their employer) from the miners (residents of West Virginia) who extract coal from the bituminous deposits underlying said township.

On January 27, 1968, Perry Township levied a $5 tax "upon the privilege of engaging in an occupation within Township of Perry in the fiscal year 1968, from the effective date of this ordinance, February 1, 1968."[1] On December 20, 1968, a tax of one percent was imposed, for each calendar year beginning with 1969 "upon the . . . compensation earned for activities or services performed or rendered within the Township by individual non-residents of the Township."[2]

It is thus clear that which is taxed by these ordinances is the performance of activities or services, for pay, within the township, that is to say, engaging in a gainful occupation within the township.

It is plain (to this Court at least) that such a tax is constitutionally valid, and supported by an adequate

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1. R. 104a-105a. For convenience, citations will be to the printed Joint Appendix in C.A. 3, No. 71-1193, cited as "R".

2. R. 115a-116a.

"nexus."[3] It is settled that non-resident federal employees may be taxed by a municipality where they work;[4] *a fortiori* employees of a private corporation are liable to such a tax.

It was stipulated on appeal in No. 71-1193 that the miners involved in this case are engaged in extracting coal within the bowels of Perry Township. The same stipulation was made at the hearing before this Court on June 21, 1971, after remand.[5]

Thus it is plain that on the merits of the case the tax is constitutional, and that the money withheld by the employer, Consolidation Coal Company, should be paid without delay to Perry Township.

How may this be done? How may this Court's conclusion be affectuated or "implemented," to use the current bureaucratic jargon?

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3. The useful term "nexus" was employed by Mr. Justice Tom C. Clark in *Northwestern Cement Co.* v. *Minnesota*, 358 U.S. 450, 452 (1959), upholding a levy upon "local activities within the taxing State forming sufficient nexus to support the same." See Dumbauld, *The Constitution of the United States* 121-25 (1964).

4. *Application of Thompson*, 157 F. Supp. 93, 98 (E.D. Pa. 1957) aff'd 258 F. 2d 320 (C.A. 3, 1958), c.d. 358 U.S. 931 (1959).

5. It is therefore unnecessary to speculate whether merely entering the mine at a portal in Perry Township (to extract coal located in West Virginia) would itself be a sufficient "nexus." Perhaps misled by a notice from the "publican" employed to collect the tax that it applied to all persons "who work or portal at the Mt. Morris portal in Perry Township" (R. 136a), the litigation in the Monongalia County, West Virginia, court, hereinafter described, spoke of miners who "portal" at Mt. Morris. R. 139a, 141a, 142a.

Although it is against public policy for courts to interfere with the collection of taxes,[6] a process which though painful to those who pay is indispensable to the maintenance of government, several years of multifarious litigation have now elapsed without Perry Township being able to get its sticky fingers on the money reposing in the adhesive coffers of the coal company.[7]

With the goal thus in sight,[8] let us examine the tortuous maze of complicating factors thrown up by the respective parties to the case.

The first temple of justice where the peregrinating proceduralists made obeisance and hung their dank

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6. *E.g.*, 26 U.S.C. 7421(a); 28 U.S.C. 1341.

7. Philosophically, it seems unconscionable for the coal company to treat the tax as valid for the purpose of withholding wages earned by its employees, but as being of questionable validity insofar as paying over the withheld fund to the taxing township is concerned. This conduct brings to mind the feat of the Reconstruction Congress which recognized the defeated Confederate States as States within the Union for the purpose of having them exercise the supreme legislative function of ratifying the Fourteenth Amendment, but denied them representation in the enactment of ordinary legislation. *Negrich v. Hohn*, 246 F. Supp. 173, 180-81 (W.D. Pa. 1965). As Plautus said, to blow and to swallow at the same time is not easy. Dean Acheson, *Power and Diplomacy*, 105 (1958); "Simul flare sorbereque haud facile est." Mostellaria, Act III, 2.105. *U.S. v. Noonan* (C.A. 3, No. 18031, April 6, 1970) [Aldisert, J.].

8. Italiam sequimur fugientem Vergil, Aeneid, V, 629.

weeds as a trophy[9] was the Circuit Court of Monongalia County, West Virginia. In that tribunal on April 30, 1969, one Lawrence W. Bailey, a foreman employed by plaintiff Consolidated Coal Company, (contending that the tax was unconstitutional and void), obtained an injunction restraining the company from paying over any part of the withheld wages to the Pennsylvania taxing bodies or collector. (R. 141a- 142a). A similar injunction was entered on May 15, 1969. (R. 142a-143a).

The next tribunal honored by the peregrinating parties was the United States District Court for the Northern District of West Virginia. In that court (perhaps because the Monongalia County court could not obtain jurisdiction over the Pennsylvania taxing authorities), the coal company on August 29, 1969, brought an action of Interpleader under 28 U.S.C. 1335. (R. 146a-151a). The Pennsylvania tax authorities as well as Bailey (as representing the class of 312 miners residing in West Virginia from whom the company had withheld wages) were made parties. *Consolidation Coal Co. v. Bailey*. 308 F. Supp. 1251, 1252-53 (N.D. W. Va. N.D. 1970). Judge Sidney L. Christie, on February 5, 1970, held (very sensibly, in our judgment) that the controversy involved Pennsylvania tax law and might more appropriately be determined by the judiciary of that Commonwealth, wherein there was in fact a pending proceeding in which all parties could participate. He therefore dismissed the interpleader action.

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9. Me tabula sacer
Votiva paries indicat uvida
Suspendisse potenti
Vestimenta maris deo.

Horace, Odes, I; v, 11. 13-16.

It is not clear what happened to the proceeding, referred to by Judge Christie, but on March 12, 1970, the Perry Township Supervisors sued Consolidated and Bailey (as representing all employees of Consolidated residing in West Virginia and employed at the mine in Perry Township) at No. 542 in Equity in the Court of Common Pleas of Greene County for an accounting. (R. 159a-168a).[10] *Eodem die* the court ordered notice by publication for three successive weeks in the Democrat Messenger, a newspaper published in Waynesburg and established in 1813. (R. 169a-172a).

The miners contend that the court should have required that the persons whose wages were withheld should be notified individually (as was done in the case at bar),[11] but it seems that the litigation was one of considerable notoriety, and that it was probably for tactical reasons[12] that no appearance was made on behalf

10. An action of assumpsit was also filed on the same date at No. 95 August Term. R. 193a.

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11. Plaintiff's counsel notified all West Virginia residents now on its payroll from whom tax has been withheld of the hearing on June 21, 1971. He stated, however, that some of the fund may be composed of wages withheld from West Virginia residents now deceased, or moved away, or no longer working for plaintiff. We think the rule *de minimis* would apply to such portions of the fund, and that the questions of law would be identical with respect to such persons and the ones who received notice, so that the interests of all members of the class are adequately represented.

12. This stratagem is akin to lack of quorum in a legislative body resulting from intentional absence of members otherwise too few to defeat a pending measure.

A noteworthy example occurred in 1787 when opponents of ratification of the federal Constitution left

of Bailey or his group, and that judgment was taken by default, insofar as they were concerned, on July 6, 1970. (R. 186a-192a). We adhere to the view previously expressed that Judge Glenn Toothman's opinion (in which he quoted from an opinion of our learned colleague on this Court, Judge Louis Rosenberg) was entirely sound and correct and properly resolved the contentions as to constitutionality which are involved in the case.

Notwithstanding all that had gone before, the peregrinating parties then turned to the true shrine of juristic wisdom, the United States District Court for the Western District of Pennsylvania, where Consolidated on September 28, 1970, filed the instant action of interpleader against the same claimants (the amount now having grown to $55,584.93 from the $18,928.47 at stake in the West Virginia interpleader action). R. 5a-13a. Upon voluminous pleadings filed by all parties and a motion to dismiss supported by lengthy documentation, this Court on February 1, 1971, granted the motion to dismiss, adopting independently the reasoning of Judge Christie and Judge Toothman, as well as holding that the Greene County determination was *res judicata* and binding upon plaintiff. R. 83-85a.

The next mill to which the peregrinating parties brought their grist for fine grinding was the Court of Appeals for the Third Circuit, which on June 7, 1971,

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the Pennsylvania assembly without a quorum until a member was forcibly brought into the house and kept there (in spite of his wish to answer a call of nature) until provision for a ratifying convention could be enacted. McMaster and Stone, *Pennsylvania and the Federal Constitution* 1787-1788, 60-71 (1888).

vacated this Court's order of February 1, 1971, and remanded the case for further proceedings. Judge Hastie dissented on the ground that "the granting of relief in this case would be contrary to the intendment of Section 1341 of Title 28 U.S.C.."[13]

The opinion emphasizes that the miners claim in this action nothing but the fund in plaintiff's hands, as opposed to seeking an injunction against future enforcement of the tax; and that in an interpleader action they are inherently limited to such relief against the *res* in plaintiff's hands. Plaintiff, in other words, is merely a stakeholder of the fund and asserts no proprietary claim to the fund.

This does indeed seem to present the typical pattern of an interpleader action.

The Court does have jurisdiction of all parties, including the stakeholder and the two claimants.

A hearing was held on June 21, 1971, at which all three parties made stipulations regarding the matters put forth by each party and regarded by such party as significant. Such oral argument as the parties wished was also heard. In the light of these stipulations and the Court's rulings on certain points raised, we believe the path is now cleared for a disposition of the case on its merits. We shall make such a disposition, the parties having made clear and preserved for appellate review their contentions which have been ruled upon adversely by this Court.

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13. This section (referred to in footnote 6 *supra*) provides that "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

As would be expected, the brunt of the argument in developing intermediate issues was borne by the tax authorities and the miners. The company, as *tertius gaudens,* had little to say, except to request the discharge from further liability or litigation upon paying the fund into court. Counsel for Consolidation also generously waived a fee, in order that the fund might go undiminished by the usual counsel fees to its true owners. Bene meruit de republica. Let this deed be remembered gratefully by posterity as exemplifying the highest traditions of the legal profession.

To begin examination of Perry Township's contentions, it is to be noted that the argument is reasserted that the instant interpleader violates the policy of 28 U.S.C. 1341 against enjoining collection of taxes levied under State law. Whatever the merits of this position may be, it would be unseemly for this Court, as an inferior tribunal, to accept it, after the majority of the Court of Appeals has apparently considered but rejected it, as shown by Judge Hastie's dissent.

Moreover, on its merits, the majority is technically right as far as it goes. All that an interpleader action can deal with is the disposition of a particular fund. Any injunctions issued against suits with respect to the fund are simply ancillary or incidental to the disposition of the fund and merely have the purpose of enforcing the distribution made by the Court.

Counsel points to the language of the Complaint where relief is sought with respect to the fund "and any additions thereto." R. 12a-13a. Counsel for Consolidation acceptably explained these words as merely covering accretions to the fund pending determination by

the Court, not as applying to subsequent taxes. In other words, the size of the fund involved in the interpleader can not definitely be known until the Court orders its distribution to the proper parties. After the Court's determination nothing further would be affected by the judgment in this litigation.

From a practical standpoint, of course, Judge Hastie and the tax authorities are right in that the pendency of the interpleader action has prevented the Township from receiving the revenue involved. Likewise Consolidation might continue to impound in its coffers subsequent withholdings, after the current fund has been paid into court and distributed. But counsel for Consolidated has in open court stated that this course will not be followed. In any event, perhaps some weight as *stare decisis* might be attributed to this Court's determination of the controlling question, namely the constitutional validity of the tax.

Moreover, statutes prohibiting injunctions against collection of taxes are subject to judicial erosion. It is interesting to note the fate of the similar provision (now 26 U.S.C. 7421) prohibiting court restraints on the collection of federal tax.[14] Similar erosion has been experienced with respect to 28 U.S.C. 2283 forbidding injunctions to stay proceedings in State courts.[15] Per-

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14. See *Standard Nut Margarine Co. v. Miller*, 284 U.S. 498, 511 (1932), and the comments in Corwin, *The Twilight of the Supreme Court*, 94 (1934); and Corwin, *Court over Constitution*, 178-81 (1938). The *Nut* doctrine was reaffirmed in *Enochs v. Williams Packing Co.*, 370 U.S. 1, 7 (1962).

15. See Dumbauld, *Judicial Interference with Litigation in Other Courts*, 74 Dickinson L. Rev. 369, 385-87 (1970).

haps the elegantly bewiskered John Chipman Gray was right in thinking that statutes are only sources of law, that only what the courts say the statute means is really law.[16]

Moreover, if Perry Township's position were accepted it would mean that no interpleader action could ever be brought if one of the claimants was a tax collecting agency. Yet the Supreme Court, in the exercise of its original jurisdiction, has taken cognizance of the conflicting tax claims of different States in what is in substance an interpleader action. *Texas v. Florida,* 306 U.S. 398, 405-412 (1939).

At any rate, to distribute the fund now existing is not quite the same thing as to enjoin the collection of taxes *in future.*

Another contention of Perry Township which it would be unseemly for this Court to espouse is that plaintiff is not entitled to a discharge upon paying the fund into court, and that this Court, upon finding further facts, should again dismiss the interpleader action.

We are not convinced that the circumstances upon which the Township bases its contention are sufficient to undermine the plain holding by the majority of the Court of Appeals that interpleader is appropriate in the case at bar.

It is said that Consolidated is not a "disinterested" stakeholder, because it is seeking to curry favor with its employees by impeding the Township's efforts to collect the tax. Consolidated is clearly "disinterested" in

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16. Gray, *The Nature and Sources of the Law,* 125 (2nd ed. 1921).

the sense that it claims no proprietary interest in the money which it holds.[17] Nothing more is required of a stakeholder subject to conflicting claims in an interpleader proceeding. The psychological motives of the company are not of importance, so long as there is color of right in the conflicting claims asserted against it.

Turning now to the contentions of the miners, we note that they reaffirm the feudal principle that allegiance and protection are reciprocal, and allege that Pennsylvania and its subdivisions do not do enough for the miners to justify taxing them. No mine safety regulations, workman's compensation, "black lung" benefits, or other services are furnished by Pennsylvania. Apparently under an administrative arrangement between the two States, whenever a joint mine is opened the State first having occasion to exercise jurisdiction retains it. In substance, then, Pennsylvania does nothing for these miners "below ground." But above ground the municipal bodies exercise their normal activities of fire and police protection and the like. Perry Township particularly emphasizes that air shafts from the mine emerge above the soil in Perry Township and that protection of the source of air is of great importance to the welfare and safety of the miners at their work.

We conclude that Perry Township performs sufficient services to sustain its power to tax. Most taxpayers nowadays feel that they are not getting their money's worth. These miners are in no different posi-

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17. This is specifically stated in plaintiff's proposed Finding No. 10. No. 11 further states: "Consol has not and does not now seek any determination with respect to the validity of the Perry Township Tax Ordinances." See note 7 *supra*.

tion than taxpayers generally. It would be impractical to insist that each taxpayer must receive a specific benefit equal in value to the amount of his tax in order to constitute an adequate *quid pro quo.* The classical example is the bachelor with no children who must nevertheless pay school tax.

Another argument emphasized by counsel for the miners is the fact that certain individuals who do not "portal" in Perry Township, but enter the mine somewhere in West Virginia, have escaped taxation.

In view of the specific wording of the ordinances and the statements of counsel for Perry Township (the draftsman of the ordinances) we are satisfied that the individuals who have come in through the back door without being caught are simply sporadic instances of beneficiaries of ineffective enforcement, and do not represent a settled policy or practice on the part of the tax authorities of treating the place where the miner "portals" as the criterion of taxation *vel non.* See *Clark v. Ellenbogen,* 319 F. Supp. 623, 628 (W.D. Pa. 1970). It is clear that working in Perry Township soil is the true test of Taxability; and that all miners who do work in the Township will be taxed if the Township catches them.

The miners also emphasize that only extraction of the coal occurs in Perry Township; and that washing, processing, and preparation of the product is completed at facilities located in West Virginia. We do not think this circumstance detracts from Perry Township's power to tax, based upon the activities which *do* take place in the township.

In conclusion, we find and hold that plaintiff is entitled to discharge from liability (with ancillary and incidental injunctive relief against litigation with respect to such liability) upon paying into court the fund in its possession up to the date of entry of this opinion, together with such interest or other accumulation as may have resulted from prudent investment of such fund by plaintiff; and that as between the claimants to the fund Perry Township is entitled to receive the fund in its entirety.

This opinion shall be deemed to contain the finding of fact and conclusions of law which the Court deems necessary to the proper disposition of the case, and such other findings and conclusions which shall have been submitted by the parties in support of the issues which they consider necessary to sustain the points which they have preserved upon the record and which shall have been approved and signed by the Court, shall be deemed to have been incorporated herein by reference as fully as if they had been set forth herein *in haec verba*.

Order

AND NOW, this 30th day of June, 1971, IT IS HEREBY ORDERED:

(a) That plaintiff shall pay into Court, ten days from the date of this Order, all Perry Township Earned Income Taxes and Occupational Privilege Taxes withheld from the wages of the class herein represented by Lawrence W. Bailey, plus the earnings accrued upon such funds prior to September 28, 1970, or the statutory interest of 6%, whichever is greater, plus the earnings from September 28, 1970 to date of payment upon all taxes withheld;

(b) That plaintiff shall file with such payment, and shall serve upon all parties, an accounting which sets forth the method of calculation of the fund paid into Court, including the dates and amounts of taxes withheld and of earnings and interest accrued;

(c) That if no objection is made to such accounting within ten (10) days of its service upon all parties, plaintiff will on the eleventh day be relieved and discharged from further liability on any claim, now or hereafter made, based upon the fund paid into Court, with the exception noted in subparagraph (e) hereof;

(d) That this Court, having retained jurisdiction of this cause for the determination of the rights of the respective defendant-claimants in and to the fund paid into court, enters judgment, as of the date of discharge, in the entire amount paid into court, in favor of defendants the Township of Perry, its Supervisors and Tax Collectors;

(e) That this Order shall not preclude the Township of Perry, its Supervisors or Tax Collectors from claiming in the State courts additional interest upon the funds interpleaded under the provision of the Earned Income Tax resolution and the Occupational Privilege Tax ordinance of Perry Township or under the Local Tax Enabling Act of 1965;

(f) That defendant, Lawrence W. Bailey, and the other members of the class which he represents, are permanently enjoined as of the date of discharge from prosecuting the actions filed by him, individually and as a member of the class, against plaintiff, in the Circuit Court of Monongalia County, West Virginia, at Law Proceeding No. 10137 and Law Proceeding No. 10145; and/or from instituting or prosecuting any other action or proceeding against plaintiff or against the Township of Perry, its Supervisors or Tax Collectors, in any other Court based upon or affecting the fund paid into Court;

(g) That plaintiff and defendant Lawrence W. Bailey pay the costs of this action;

(h) That defendants, The Township of Perry, Greene County, E. D. Lemley, L. Carl Phillips, Floyd Birch, Estella John, and Don Wilkinson are permanently enjoined as of the date of discharge from further prosecuting the actions brought by them against plaintiff in the Court of Common Pleas of Greene County, Pennsylvania, at No. 542 in Equity and No. 95 August Term, 1969, in Assumpsit, specifically including but not limited to the filing of or further prosecution of any motions and/or rules to show cause filed or to be filed by said defendant or their counsel; and/or from insti-

tuting or prosecuting any other action or proceeding against this plaintiff in any other Court based upon or affecting the fund paid into Court by plaintiff.

DUMBAULD, U.S.D.J.

ORDERED TO BE FILED this 30th day of June, 1971.

EDWARD DUMBAULD
United States District Judge